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PETITION

STATEMENT OF FACTS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, the people of Sioux County, Nebraska, through its Board of Commissioners, and at the request of the First National Bank of Harrison, in that state, designated said bank as a depositary of county funds upon certain conditions, among which was the execution of a satisfactory bond. Accordingly, on December 12, 1922, said bank as principal and the Respondent as surety executed a bond reciting that they

> "are held and firmly bound unto the people of the County of Sioux in the State of Nebraska, in the just and full sum of Thirty Thousand and no/100 . . . Dollars * * * the amount whereof shall be subject to withdrawal or diminution by said County Treasurer, as the requirements of said County shall demand, and *which amount may be increased or decreased as the said Treasurer may determine*" (R. 3, 4).

In consideration for its undertaking Respondent received premiums based on the full amount therein stated and, in reliance thereon, the County, through its Treasurer, deposited funds in said bank to an amount equal to said sum and more. Said bond was meanwhile filed with the said Board of Commissioners and their approval invoked. Some fourteen months later an official examination of said bank disclosed that it had become insolvent and on February 12, 1924, a receiver was appointed and Petitioner was obliged to call upon Respondent to perform its undertaking. Although no ques-

tion was ever seriously raised as to its liability for five-sixths of the deposit, Respondent refused to pay without suit and on October 7, 1924, an action on the bond was begun in the State Court for Sioux County, against the Respondent, which, one month later, filed a petition and bond and caused the action to be removed to the United States Court for the district of Nebraska. Petitioner there filed an amended petition, much of which was admitted in the answer, (R. 24), praying recovery of the full amount of the bond and also "a reasonable sum as the plaintiff's attorney fee" by virtue of Neb. Comp. Stats. 1922, sec. 7811, providing that in actions upon such bonds "the court, upon rendering judgment * * * shall allow the plaintiff a reasonable sum as an attorney's fee," etc. The answer raised as the sole defense the claim that because another statute (sec. 6193) forbade a county treasurer to deposit an amount exceeding 50 per cent of the capital stock of the bank, and because the principal's capital stock was limited to $50,000, Respondent was not liable; and it prayed dismissal with costs. Upon a trial to the court, after waiver of a jury, judgment was rendered for the full amount of the bond and also for an attorney's fee of $3,000, or 10 per cent of the recovery. Upon Writ of Error, the Eighth Circuit Court of Appeals, on December 20, 1926, reversed the judgment, absolving Respondent from all sums above $25,000 and from all attorney's fees under the statute. (16 Fed. (2nd) 688.) Petitioner submits that said judgment of reversal is erroneous and contrary to law for the following reasons:

(I) *The lower court misinterpreted the Nebraska decisions and based its ruling upon dicta which have been overruled.* (*pp. 5 to 8 infra.*)

(II) *The lower court erred in treating Neb. Comp. Stats. Sec. 6193 as "a part of the surety's obligation" while excluding therefrom sec. 7811 requiring "a reasonable attorney's fee to be taxed."* (*pp. 8 to 9 infra.*)

(III) *The lower court's decision conflicts with other Federal decisions on both points.* (*pp. 9 to 13 infra.*)

(IV) *The lower court erred in holding Rev. Stats. Secs. 823 and 824 exclusive in causes removed from a state court; and that point should be affirmatively settled by this court.* (*pp. 13 to 15 infra.*)

WHEREFORE, Petitioner prays the allowance of a writ of *certiorari* to the Court of Appeals of the Eighth Circuit in said cause No. 7314 (*National Surety Company,* a Corporation, plaintiff in error, v. *Edwin B. Lyons,* County Treasurer, etc., defendant in error); that said cause may be reviewed and determined by this court and that the judgment of said Court of Appeals be vacated and that of said district court reinstated and for such other and further relief as may be just, equitable and proper.

CHARLES S. LOBINGIER, *of Counsel.*

EDWIN D. CRITES, *Attorney for Petitioner.*

Certificate of Counsel

We hereby certify that the foregoing petition is, in our judgment, well founded and is not interposed for delay.

CHARLES S. LOBINGIER, *Of Counsel.*

EDWIN D. CRITES, *Attorney for Petitioner.*

BRIEF

I

The Lower Court Misinterpreted the Nebraska Decisions and Based Its Ruling Upon Dicta Which Have Been Overruled.

At the very outset of its discussion of the first branch of the case the lower court says (R. 56):

> "It is claimed that the Supreme Court of the state has so construed the statute. If that be so we will of course follow the interpretation given it by that court."

Evidently "that" was found to "be so" for the lower court closes its discussion thereof by declaring (R. 59):

> "From these *decisions* (*sic*) we think the unavoidable conclusion is that a surety is not liable for over-deposits made by a county treasurer in excess of any of the limitations."

Now the truth is that there are no such "decisions" and that the lower court recognizes this at the very beginning by conceding (R. 56):

> "It can hardly be said that the exact issue made in this case on the third limitation *has been presented to that court.*"

Well since "the exact issue has (*not*) been presented" nothing that the state court may have said about it is binding on this or any other Federal Court.

> "To make it so," said this court in *Carroll* v. *Carroll*, 16 How. 287, "there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties * * * and therefore this court and other courts, organized under the common law, has

> never held itself bound *by any part of any opinion,* in any case, *which was not needful to the ascertainment of the right or title in question.*" (Italics ours.)

For the rule is well established that the Federal Courts will not follow the *dicta* of state courts but only their decisions (*Carroll* v. *Carroll,* 16 How. 275, 287; *St. Louis R. Co.* v. *R. Co.,* 145 U. S. 393, 403; *Pollock* v. *Farmer's Loan & Trust Co.,* 157 U. S. 429, 575; *Central R. Co.* v. *Wright,* 164 U. S. 327, 332, 333). This court is not even bound by its own expressions regarding points not involved in the particular case before it. (*Cohens* v. *Virginia,* 6 Wheat, 399; *McCormick Machine Co.* v. *C. Aultman,* 169 U. S. 606, 611; *U. S.* v. *Wong Kim Ark,* 169 U. S. 678, 679; *Bardes* v. *Bank,* 178 U. S. 534; *Bryan* v. *Bernheimer,* 181 U. S. 197; *Harriman* v. *Northern Securities Co.,* 197 U. S. 244, 291).

None of the Nebraska cases which the lower court cites really approaches the question here involved except *State People's State Bank,* 111 Neb. 136, 198 N. W. 1018 and that has recently been interpreted by the Nebraska Supreme Court in a sense exactly opposite to the lower court's interpretation. For that Supreme Court has now rendered a *decision* on this question. In *Scott's Bluff County* v. *First Nat. Bank,** March 1, 1927, that court had this identical question which it disposed of as follows:

> "This is an action by the county of Scott's Bluff and its county treasurer, Schmidt, to recover from the First Na-

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* Unreported as yet, but a certified copy filed with the Clerk of this Court.

tional Bank of Gering and from Globe Indemnity Company, hereinafter called the Company, the sum of $5,000 and accrued interest on a certain bond for that sum executed by those defendants to secure deposits of county funds. Trial to the court resulted in a judgment against defendants for the full amount and they appealed.

"The bank had a paid-up capital of $25,000. To secure deposits it had given surety bonds, including that of the Company, for a total sum of $57,500. * * * The county deposits of record on the books of the bank were $55,892.66, without including the Barton check of $1,274.48. The total of these two items is $57,167.14; but contractual interest at 3% on the daily balances increased the total deposits to $57,500 or more, if the Barton check be considered as a deposit. The other surety companies paid the face of their bonds, $52,500, and suit was brought against the Company for the full amount of $5,000 on the theory that the county deposits totaled $57,500 or more when the bank closed.

"The Company argues, inasmuch as section 6193, Comp. St. 1922, prohibited the treasurer having deposit with the bank a sum exceeding 50% of the $25,000 paid-up capital of the bank, that the Company is liable with all the other bonding companies for only its *pro rata* share of $12,500. Questions akin to this have been before this court and a contrary principle has been followed. For examples: Notwithstanding section 6193, when a county treasurer deposits public funds in a state bank in excess of 50% of the paid-up capital stock of the bank it was held, in *State* v. *People's State Bank*, 111 Neb. 136, that the entire deposit was within the protection of the depositors' guaranty fund. Where a contract by a state bank to borrow money in excess of the debt limit authorized by its charter has been performed by the lending of money to such state bank, it will not be allowed to avoid the payment of its notes. *State* v. *Farmers State Bank*, 112 Neb. 597. And while the law prohibits a state bank from making loans in excess of a certain percentage of its paid-up capital stock and surplus, yet such loans are frequently made and their payment has always been enforced by this court when suit has been brought upon the notes. *State* v. *People's State Bank*, 111 Neb. 136. We adopt the same principle here. *The bank could not defend a suit by the county to enforce its claim to deposits on the ground*

that they exceeded the statutory percentage of the bank's capital. It necessarily follows that the surety could not assert such a defense, for the engagement of the surety was to pay deposits of the county in the bank, if its principal failed to do so." (Italics ours.)

II

The Lower Court Erred in Treating Neb. Comp. Stats. Sec. 6193 as "a Part of the Surety's obligation" while excluding therefrom Sec. 7811 requiring "a Reasonable Attorney's Fee to Be Taxed"

It is a poor rule that will not work both ways; but the lower court worked only one way the rule which it stressed (R. 56, 57) as found in *Cole* v. *Myers,* 100 Neb. 484, 160 N. W. 894, viz. that "the statute is by construction a *part* of the depository bond." That case, is not, in view of *Scott's Bluff County* v. *First Nat. Bank,* just quoted, an authority for the lower court's conclusion; but *Cole* v. *Myers* was not expressly overruled and its doctrine must be applied here so far as it is applicable at all. The astonishing feature of the lower court's opinion is its application of the doctrine to the statute limiting the treasurer's deposits while ignoring the doctrine's obviously greater applicability to the statute requiring the taxation of "a reasonable attorney's fee." For the language of the latter is mandatory and leaves no alternative: "In *all cases* * * * the court, upon rendering judgment * * * *shall* allow the plaintiff a reasonable * * * attorney's fee." (Sec. 7811.) Since

that provision is "a part of the depository bond," why did not the lower court apply it? If it had done so it would not have fallen into the error of so misconstruing the Nebraska cases which it cites as to declare (R. 61) that "This then is not a statute affecting the contractual rights and liability, but one on the subject of costs only." This in the face of the declaration applied to the first point that "the statute is by construction a part of the depository bond" and "is to be read into the innocent surety's obligation"! (R. 56, 59). How can the statute be so "read" without "affecting the contractual rights" of the surety? If the lower court had been consistent and carried its own doctrines to their logical conclusion, it would have upheld the district court in obeying the mandatory statute of the state and allowing the reasonable fee which by its contract the surety had undertaken to pay.

III

The Lower Court's Decision Conflicts With Other Federal Decisions on Both Points:

(1) *As to the Limit of the Bond*

In *Cheyenne* v. *Md. Casualty Co.*, 13 Fed. (2nd) 401 a similar contention was rejected under a Wyoming Statute limiting the treasurer's deposits to 90 per cent of the bond's penalty. The court followed *Gregg* v. *Hinkle*, 29 N. M. 576 to the effect that such a provision

> "Does not create a limitation of the surety but is a police regulation, directed to the officer as an additional element of safety, in order that not only the principal but any accretions may be fully insured."

This in fact is the prevailing rule in the state courts (*State* v. *Pederson,* 135 Wis. 31, 114 N. W. 826 (per Winslow C. J., citing *Hart* v. *State,* 95 U. S. 316); *State* v. *Fidelity & Guaranty Co.,* 81 Kan. 660, 106 Pac. 1040) and the two cases which the lower court cites (R. 59) on this point in no way conflict with the above. Thus the lower court decided an important question of general law against the weight of authority.

In *National Surety Co.* v. *Le Flore County,* 262 Fed. 325 the bank's surety sought release because the bank had not been legally named as a depository. But the Fifth Circuit Court of Appeals, while admitting such to be the case, declared that the surety could

> "not assert as against the county the invalidity of the appointment of the depositary and of the fidelity bond; this not merely because the bond recited the appointment, but because by reason of the execution of it and its delivery to the county in consideration of a premium paid to the appellant, the loss of the funds deposited was brought about."

The court quoted copiously from Marshall C. J. in *U. S.* v. *Maurice,* 2 Brock. 96, 26 Fed. Cas. 1211.

(2) *As to the Attorney's Fee*

In *New Amsterdam Casualty Co.* v. *Shields,* 155 Fed. 54, the Sixth Circuit Court of Appeals, in an opinion concurred in by Lurton J., in an action on an insurance policy upheld an allowance, under the local statute of an attorney's fee of 20 per cent of the amount recovered. And as was said in *Nat. Surety Co.* v. *McCormick,* 268 Fed. 185, involving this same surety's obligation:

> **"This is not that ordinary contract of voluntary suretyship as to which there has arisen a sort of tenderness toward sureties. This is a contract of insurance, entered into by the surety for the revenue which it derives from the business of suretyship and in this relation the obligation should be treated as other insurance contracts which are usually construed most strongly against the insurer." (Citing many cases.)**

The lower court's decision on the second question likewise conflicts with its own prior decisions. It now seeks to distinguish *Spring Garden Ins. Co.* v. *Amusement Co.,* 178 Fed. 519 by saying (R. 63) that it "was a suit in equity and sec. 823 and 824 were not controlling." Why not? Sec. 823 expressly mentions "solicitors" who appear only in equity causes while sec. 824 expressly provides what the fee shall be "on a final hearing in equity." If a case in equity involves a fund in the court's custody a chancellor might have more discretion in distributing it than a common law judge. But such was not the situation in the case last cited. In fact the costs were there awarded in actions at law and the complaint was "that the court erred in decreeing that the insurance companies pay the costs in the actions at law" (178 Fed. 534). Indeed, one of the court's main grounds for allowing costs was that "the actions at law were properly brought" (Id.). More than that the actions, though equitable in form (as to pleadings), were treated and tried as actions at law and the court expressly said "that an action such as this is an action at law without any equitable features" (Id. 536) citing *Mechanics' Ins. Co.* v. *Distilling Co.,* 173 Fed. 888.)

The lower court's decision also conflicts with *Williamson* v. *Ins. Co.* 141 Fed. 54, which it seeks to distinguish on the alleged ground that sec. 8012 of the Missouri Statutes (1899) there applied, "did not allow recovery [of an attorney's fee] as a part of the costs." But how else could it be allowed? The Missouri statute provides, as does that of Nebraska, for "a reasonable attorney's fee"; and the fact that the word "costs" is not expressly used does not change their character. For, as declared in the first case cited by the lower court on this question:

> "The fact that the allowance of attorney's fees and taxing them as costs in the case depended on their being an express provision in the contract for their allowance, would not change the nature of the allowance." (*Nye-Schneider-Fowler Co.* v. *Bridge, Hoye & Co.*, 98 Neb. 863, 867.)

This decision then cites *Security Co.* v. *Eyer*, 36 Neb. 507, where it is observed:

> "Attorney's fees in States where they are allowed by the court to the successful party are *in the nature of costs and are taxed and treated as such. They are no part of the judgment proper.*"

So in *Doe* v. *Manchester*, 12 C. B. 474, 74 E. C. L. 474, 138 Reprint, 992, a statute allowing "full costs and expenses" was held to include attorney's fees. When, therefore, the Eighth Circuit Court of Appeals upheld the allowance of an attorney's fee in *Williamson* v. *Ins. Co.* 141 Fed. 54, it was meant to be taxed as a part of the costs and the lower court's classification of them as "compensatory damages" is without foundation or precedent so

far as we have been able to find. In substance the case last cited is no different from this. In both, a state statute provided an attorney's fee which, in the cited case the court awarded despite Rev. Stats. Secs. 823 and 824.

IV

The Lower Court Erred in Holding Rev. Stats. Secs. 823 and 824 Exclusive in Causes Removed from a State Court; and That Point Should Be Affirmatively Settled by This Court.

All of the cases which the lower court cites in support of its theory that these provisions are exclusive, were ordinary cases begun in a Federal court, involving no special circumstances or equities and calling for no exercise of judicial discretion. Under such conditions sections 823 and 824 were naturally applied. But this court has never held them exclusive under other conditions. Among the numerous cases in which it has approved the allowance of attorney's fees far in excess of the statutory limit, are *Fowler* v. *Trust Co.*, 141 U. S. 411 (5 per cent of amount involved); *Dodge* v. *Tulleys*, 144 U. S. 451, 457 ($500 allowed contrary to state decisions); *Harrison* v. *Perea*, 168 U. S. 311, 317 the court saying (325) "the amount was within the judicial discretion."

It is true that these were equitable proceedings; but the allowance was not placed on that ground. In the first case, e. g., it was made because the contract so provided and it was not found unreasonable. Yet surely the statute of a state, not merely

authorizing but *requiring* "a reasonable * * * attorney's fee," should not be given less force than a private contract. Moreover, as we have already seen, Sec. 824 is as mandatory "in equity or admiralty" as "in cases at law."

But not all the cases where attorney's fees were allowed in excess of the limit in sec. 824 were in equity. *Ex parte Jaffray,* 1 Lowell, 321, 13 Fed. Cas. 284, was a bankruptcy, not an equity, proceeding, and the same was true of *Randolph* v. *Scruggs,* 190 U. S. 533. In the former the court conceded that "the fee bill of Feb. 26, 1853 [now secs. 823 and 824] does appear to be intended to cover the whole ground of taxation of costs at law in equity and admiralty"; but "upon reflection" it "concluded that the fee bill is probably intended to reach only taxable costs, commonly so called"; in other words the ordinary case. "The strong equities of the petitioners' case" there led the court to allow substantial fees of two counsel for the same party. Yet "the equities" were no stronger than here, where the people of an entire country were obliged to sue for a sum, five-sixths of which were conceded to be due and all of which was included under the surety's express obligation. Had the cause remained in the court where it was brought the people would have been allowed "a reasonable * * * attorney's fee"; for the statute is mandatory. Yet because the surety, against the people's desire, effected the removal of the cause to another court, the people are not only put to

much greater expense in enforcing their just claim, but are deprived of their statutory right to reimbursement and the surety evades the requirements of the statute in contemplation of which it contracted. Moveover, a Nebraska statute of that very same import had been upheld by this court in *Farmers' etc. Ins. Co.* v. *Dobney,* 189 U. S. 301 and the evident purpose of removing the cause was to evade the effect of that decision and the statute which came within its terms.

Now the Eighth Circuit Court of Appeals had before it a very similar situation in *Spring Garden Ins. Co.* v. *Amusement Co.,* 178 Fed. 519. The insured had commenced ten actions on insurance policies in the state court and the insurers caused the removal of five to the Federal Court, which heard the whole controversy as one at law (though equitable in form) rendered judgment for the insured and over the insurers' objection taxed the attorneys' fees provided by the state statute because

> "Had the actions proceeded to judgment (i. e., in the state court) the costs would have followed the judgment; and the insurance companies will not be permitted to evade the costs by simply appealing to a court of equity."

So here, the surety should not be permitted to evade the terms of a valid statute by simply removing the cause. No case has been cited, and we have found none after extensive search, where such a course was permitted. The decision last cited was conclusive on the lower court and its attempted distinction as an equity case we have seen to be

groundless. In *Central R. Co.* v. *Pettus*, 113 U. S. 116, this court allowed counsel fees to the extent of 5 per cent of the amount involved in a case which had been removed from the state court and it should now affirmatively decide that the costs prescribed by a state statute can not be evaded by the party who effects removal.

In conclusion we respectfully submit that the Eighth Circuit Court of Appeals erred in its findings and judgment, causing great loss and hardship to the people of Sioux County, and confusion in the jurisprudence of the Federal Courts, and that a writ of *certiorari* should be issued as prayed.

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May It Please the Court:

A most unusual situation confronts the court in this case. The lower court based its decision on two propositions (R. 47). The first, in which the lower court assumed to follow the state court, was soon afterward repudiated by the latter (*Scott's Bluff County* v. *First National Bank,* 212 N. W. 617). The second proposition has now been repudiated by the lower court itself which, about three months after deciding the case at bar, decided *Business Men's Assur. Co.* v. *Campbell,* 18 Fed. (2d.) 223, in accordance with petitioners' contention here. Moreover this court has virtually decided the second question by denying writs of *certiorari* in *Globe Indemnity Co.* v. *Sulpho-Saline Co.,* 266 U. S. 606, and *Hartford Fire Ins. Co.* v. *Fertilizer Co.,* 268 U. S. 704, in each of which the attorney's fee here claimed had been allowed. Little, it would seem, remains for petitioners more than to supplement their original brief, upon which they rely, by indicating the bearing of these later decisions and discussing the single new question which arises concerning attorney's fees in this court.

I.

(Supplementing Original Brief II, 8, 9)

THE DOCTRINE OF *COLE* V. *MYERS,* 160 N. W. 894, THAT "THE STATUTE IS, BY CONSTRUCTION, A PART OF THE DEPOSITORY BOND," IS THE LAW NOT ALONE OF NEBRASKA BUT OF THIS FORUM AND MUST BE APPLIED HERE.

That doctrine is in no way affected by the cases which the lower court cites (folio 62, 63). In all of them the contract was made *before* the enactment of the statute and it could not have become part of the bond. Necessarily, then, the question arising there was not presented, and could not have been decided, in those cases. Nevertheless it is well to note how the Nebraska Court has handled the question which *was* presented. In the first case cited, *Nye-Schneider Co.* v. *Bridges,* 151 N. W. 942, the court treated the provision for attorney fees as contractual, saying:

> "It seems clear that the Legislature, by the Act of 1913, did not intend to impair *the obligations of existing contracts.*"

Even on rehearing the court allowed the fees only because it felt itself foreclosed by prior decisions which affect in no way the point here involved.

> "If the question we are considering was now presented for the first time," it declared (155

> N. W. 236), "we would hesitate to say that this statute does not create and *add to the contract a legal liability.*"

In the second case, *Ward* v. *Bankers' Life Ins. Co.*, 157 N. W. 1017, there was no discussion of the question; fees were allowed on the authority of the case last cited. In the third case, *Reed* v. *Bonding Co.*, 166 N. W. 196, the court declared that—

> "The reasons advanced for this contention (that the provision impairs the obligation of the contract) * * * and the manner in which they are presented in this brief, might well cause us to hesitate if the question was an open one."

Now these are all of the cases upon which the lower court based its conclusion (Tr. fol. 63) that the statute requiring attorney's fees to be taxed is not one "affecting the contractual rights and liability of the defendant." In not one of these cases was the doctrine of *Cole* v. *Myers*, 160 N. W. 894, questioned, and it seems clear that if the statute had antedated the contracts, it would have been treated as part of them. And even as those contracts were, the Nebraska court, as now constituted, evidently considers the provision for fees a contractual one and only with the greatest reluctance tolerates any other view.

Again, even if the provision is treated as pertaining to the remedy the liability is nevertheless contractual; for the parties may contract that a particular remedy be applied just as they may con-

tract that their obligations be enforced in a particular forum or according to the laws of a particular jurisdiction (9 Cyc. 665). When, under the doctrine of *Cole* v. *Myers, supra,* the statute in question became "a part of the depository bond" respondent thereby contracted to pay the fee therein prescribed. Its liability for such payment is, therefore, contractual. It would be a strange anomaly, indeed, if such a liability could be escaped because the court, in construing contracts made before the statute, and of which it could not possibly have formed a part, reluctantly followed cases which speak of it as pertaining to the remedy. Surely statutes cannot be evaded in that way.

That the statute was intended to impose a contractual liability is clear from its legislative history. It was originally enacted in 1913 when, under the doctrine of *Globe Pub. Co.* v. *State Bank,* 41 Neb. 175, and *Gulf, etc., R. Co.* v. *Ellis,* 165 U. S. 150, all Nebraska statutes of this character were classified as either contractual or penal. The legislature was careful so to frame the act that it would not be penal. As noted by the lower court in its latest decision on the question, "the lawmakers in enacting this statute evidently intended to meet the ruling in *Ry. Co.* v. *Ellis,* 165 U. S. 150. * * * To avoid the ruling in the *Ellis case* it was provided that the attorney's allowance be taxed as costs *instead of having it declared a penalty." (Business Men's Assur. Co.* v. *Campbell,* 18 Fed. (2d) 223.)

Such was the legislative intent as found by the

lower court which pertinently added: "It is the duty of the court to give effect to the intent of the lawmakers."

"The purpose of the statute," said the state court in *Gipson* v. *Ins. Co.,* 199 N. W. 542, "was to allow an attorney's fee to a *successful* plaintiff in the class of cases * * * where resort to law was reasonably necessary to secure his rights."

"The taxing of an attorney's fee does not increase such liability" (*Swisher* v. *Fidelity Co.,* 113 Neb. 595). By avoiding the imposition of a penalty, therefore, the legislature placed the statute in the only other class—contractual.

"It is not correct," said this court in *M. K. & T. R. Co.* v. *Cade,* 233 U. S. 651, "to consider this [such a] statute as imposing a penalty" (Cf. *M. K. & T. R. Co.* v. *Harris,* 234 U. S. 421; *C. & N. W. R. Co.* v. *Nye Co.,* 260 U. S. 39; *Smith* v. *R. Co.,* 99 Neb. 719; *Marsh* v. *R. Co.,* 103 Neb. 654).

For we are not restricted to Nebraska law on this question. Indeed even the lower court found the doctrine of *Cole* v. *Myers* to be a general, and not merely a local one, saying:

> "It will be noted that the court in that case said that the statute here relied upon is a part of the depository bond. We take that to be an announcement of the general principle that the law of the place where a contract is made becomes a part of the contract. That is, the contract is to be construed and its obligations determined, according to the law of the place. *2 Williston on Contracts,* sec. 516; *Ogden* v.

Saunders, 12 Wheat. 212; *Railroad Companies* v. *Schutte,* 103 U. S. 118, 140; *Tennessee Bond Cases,* 114 U. S. 663, 688." (Tr. 49).

But more applicable than any of those last cited is *Hawthorne* v. *Calef.,* 2 Wall. 10, where this court held that a state statute rendering stockholders personally liable, to the extent of their shares, for corporate debts, entered so far into contracts of those dealing with the corporation, that the liability could not be removed by repeal of the statute. In so holding this court reversed a judgment of the Maine Supreme Court, which held that the liability was not contractual, and it thus demonstrated that, in determining the nature of such liability, this court would act independently and would not follow the state court as if it were merely construing the terms of a statute. Respondent saw fit to remove the cause to this forum and thereby submitted itself to the jurisprudence prevailing here as to the nature of its liability, which this court has pronounced contractual; for there is no difference on that point between the nature of the statutory liability here and that construed in *Hawthorne* v. *Calef.* Both entered the contract in exactly the same way—by incorporating the statute therein.

It is clear, then, that Respondent's undertaking included the payment of "a reasonable sum as an attorney's fee" in case of suit and that such undertaking is none the less contractual because it is enforced under the guise of awarding "costs." For

the nature of one's liability is determined by the *manner in which it was incurred*—not by the words used in the judgment enforcing it. Here the liability was incurred by Respondent's voluntary execution of the bond of which the statute fixing the attorney's fee was a part. The essential and contractual nature of such liability cannot be changed by a mere direction that, in the judgment of enforcement, it be "taxed as part of the costs. That phrase would, if necessary, be treated as legislative surplusage; but it is not necessary because the phrase changes nothing. The entire liability is enforced in the same judgment. The designation of a part thereof as "costs" has no effect upon the contractual nature of the liability. And, it is hardly necessary to add, that nature is not changed by bringing the cause into this forum. Whatever the Nebraska court may have thought about it, such liability is contractual here and Petitioners' corresponding right is likewise contractual. It follows that such right must be enforced here in some form regardless of whether Rev. Stats. secs. 823, 824 include it. For, as was well said by the lower court in a later case than that at bar:

> "This act was not intended to make such allowances ordinary costs as are fees of court officers or attorney's docket fees. Such allowances are made to plaintiff and not to the counsel" (citing *Stuart* v. *Boulware,* 133 U. S. 78) *Business Men's Assur. Co.* v. *Campbell,* 18 Fed. (2d.) 223).

II

(Supplementing Original Brief IV, 13-16)

A reversal of the lower court's ruling as to the attorney's fee is indispensable in order to keep that court consistent with itself. We have seen how it allowed such fees in 178 Fed. 519. It has done so since in several instances, one of them *after* its decision in this case. In *Globe Indemnity Co.* v. *Sulpho-Saline Co.,* 299 Fed. 219, the same trial judge allowed attorneys' fees under this identical statute, the Court of Appeals (lower court here) upheld the allowance and this court denied a writ of *certiorari* (266 U. S. 606).

Again in *Business Men's Assur. Co.* v. *Campbell,* 18 Fed. (2d) 223, the same trial judge allowed an attorney's fee under the same statute. The same objection (upheld in this case) was presented to the lower (appeals) court and rejected in the case last cited. Now what is the district judge to do who finds his rulings receiving conflicting treatment in the Court of Appeals? Necessarily he must look to this Court.

So the Fifth Circuit Court of Appeals has recently upheld an allowance by the district court, under a state statute similar to this, of an attorney's fee of 10 per cent in an action on an insurance policy (*Hartford Fire Ins. Co.* v. *Fertilizer Co.,* 4 Fed. (2d) 835) and this court approved the ruling by denying a petition for a writ of *certiorari* (268 U. S. 704).

III.

PETITIONERS ARE ENTITLED TO ATTORNEYS' FEES IN THE APPELLATE PROCEEDINGS.

As originally enacted the section now constituting Neb. Comp. Stats. sec. 7811, provided in general terms for "a reasonable sum as an attorney's fee" (Neb. Sess. Laws, 1913, p. 738) and the state court held that this was taxable in the trial court only (*Kaneft* v. *Ass'n*, 102 Neb. 92). Recognizing the inadequacy of a provision which left the insured thus unprotected in appellate proceedings where the expense is often as great, or greater, than in the trial court, the Legislature, in the year following the decision last cited, passed this amendment which now forms the last part of Sec. 7811:

> "If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings" (Neb. Sess. Laws, 1919, Sec. 604).

There can be no doubt then as to the legislative intent; the statute is mandatory (*O'Shea* v. *Hotel Co.*, 109 Neb. 317, 334); and the sole question is whether respondent can evade it merely by removing the cause to this forum after executing the bond in question with full knowledge that the statutory amendment above quoted became a part of said bond. The state court has regularly enforced the amendment (*Cent. Neb. Co.* v. *Olson*,

111 Neb. 402; *Swisher* v. *Fidelity Co.*, 113 Neb. 595).

And where the trial court fails to allow such fees, the appellate court will tax them for both (*Nye-Schneider-Fowler Co.* v. *Bridges*, 98 Neb. 868). An exception is made where the insurer succeeds on the appeal (*O'Shea* v. *Hotel Co.*, 111 Neb. 584) and this removes the statute from the inhibition of *C. & N. W. R. Co.* v. *Nye-Schneider-Fowler Co.*, 260 U. S. 35, where this court said (p. 46) that the state court's interpretation "controls our view" (Cf. *M. K. & T. R.* v. *Harris*, 234 U. S. 416).

Hence in this case if the lower court had *properly* reversed the district court's judgment, no attorney's fee would have been taxable in the court *a quo;* but since that reversal was erroneous (as shown by its decision three months later in *Business Men's Assur. Co.* v. *Campbell*, 18 Fed. (2d) 223), an additional attorney's fee should have been taxed in the lower court. This court should now correct the omission by taxing such a fee here in addition to affirming the trial court's judgment. Such a fee was taxed by the Sixth Circuit Court of Appeals for both the trial court and the appellate court (*L. & N. R. Co.* v. *Dickerson*, 191 Fed. 705, 712) Cf. *Gulf, Etc., R. Co.* v. *Walker*, 104 Miss. 363; *Finucane* v. *R. Co.*, 169 Ill. App. 175).

IV.

THE AMOUNT OF THE FEE

The district court's allowance of 10 per cent of the recovery for services in that court was strictly within the limits of the state court's practice which has allowed in such cases 21 per cent (*O'Shea* v. *Hotel Co.*, 111 Neb. 584), 12½ per cent (*Wirtele* v. *Grand Lodge*, 111 Neb. 306), and 10 per cent (*Cent. Neb. Co.* v. *Olson*, 111 Neb. 402). The Fifth Circuit Court of Appeals in a similar case upheld an allowance of 10 per cent of the face of the policy (*Hartford Fire Ins. Co.* v. *Wilson*, 4 Fed. (2d) 837). The lower court, in its latest decision on the question, allowed 10 per cent for each trial at *nisi prius* (*Business Men's Assur. Co.* v. *Campbell*, 18 Fed. (2d) 226), and in a previous one, where "there was no evidence as to a reasonable amount," said that—

> "the court is as good judge of reasonableness of attorney fees for services in that court as anyone. Any testimony as to what would be a reasonable fee would be in the nature of expert evidence and, as such, advisory but not binding upon the court." (*Globe Indemnity Co.* v. *Bath Co.*, 299 Fed. 222.)

In this case respondent has compelled petitioners to pursue their now admittedly just claim through two appellate courts in each of which the expense of employing counsel was fully as great as in the trial court. If Respondent had not ap-

pealed to the lower court and there sought and obtained an erroneous judgment, petitioners would not have been forced to come to this court. It was just such a case that the statute was designed to cover, and we respectfully ask this court to apply it and besides reinstating in full the trial court's judgment, to allow 10 per cent thereof as an attorney's fee in the appellate proceedings.

EDWIN D. CRITES,
Attorney for Petitioners.

CHARLES S. LOBINGIER,
Of Counsel.

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Number 196.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1927.

THE PEOPLE OF SIOUX COUNTY, NEBRASKA (SUING BY EDWIN B. LYON, TREASURER), PETITIONER,

v.

NATIONAL SURETY COMPANY, A CORPORATION, RESPONDENT.

BRIEF OF RESPONDENT.

ANDREW M. MORRISEY, Omaha, Nebraska,
Attorney for Respondent.

RUSH C. CLARKE,
JAMES G. MOTHERSEAD,
R. T. YORK, Scottsbluff, Nebraska,
Of Counsel.

May It Please the Court:

The petitioner herein has filed recently what is termed "Petitioner's Supplemental Brief," purporting to supplement the original brief incorporated with its petition for

writ of certiorari. This supplemental brief contains no statement of the facts, no statements regarding the judgment of the lower court, the claims advanced or the rulings made, no specification of errors, and the argument is more or less supplementary in character and so disjointed, taken by itself, as to be unintelligible.

Our understanding of the rule is that the petitioner must file his brief three weeks before the case is called. Petitioner in this case failed to do this, and now seeks to redeem himself by standing on his petition for writ of certiorari, together with his supplemental brief. We understand that the petition for writ of certiorari cannot be petitioner's brief on the case, and undoubtedly the supplemental brief should comply with the rules of this court.

The result is that it will require diligent searching of the records by this court to learn what is involved here. To simplify the matter, we here endeavor to give a very short

STATEMENT OF THE FACTS.

The respondent, the National Surety Company, as surety with the First National Bank of Harrison, Nebraska, a national bank with a paid-up capital stock of $50,000.00, executed a depository bond (Trans. of Rec. pp. 44-47). This bond was a statutory bond required by law. It was given to protect the county treasurer of Sioux County, Nebraska, in the deposit of public moneys of Sioux County in the First National Bank. Under Nebraska statute, hereafter referred to, the treasurer was prohibited from depositing an amount equaling more than 50 per cent of the paid-up capital stock of the bank, in this case $25,000.00. The penalty of the bond, however, was $30,000.00. During the term of the bond the county treasurer deposited $35,395.70. However, the county treasurer, in addition to the

respondent's bond, took the bond of certain individuals in the sum of $10,000.00, which is denominated an excess bond.

The bank became insolvent and closed its doors. Thereupon, Lyon, treasurer of Sioux County (not the people of Sioux County, who have no standing in any court under our law), sued the respondent in the District Court of Sioux County, Nebraska, for full penalty of the bond, $30,000.00, with interest (Trans. of Rec. pp. 1-8). The removal was taken to the District Court of the United States for the District of Nebraska, Chadron Division, where plaintiff filed an amended petition (Trans. of Rec. p. 16 et seq.). This was a copy of the original petition, except that it prayed for a taxation of an attorney's fee for plaintiff as costs. Defendant, the respondent, answered, admitting the giving of the bond, making of the deposits, etc., and pleaded as its principal defense that the paid-up capital stock of the First National Bank of Harrison, Nebraska, was $50,000.00; that, under the laws of Nebraska, the county treasurer was forbidden to deposit any sum in excess of 50 per cent of the paid-up capital stock, and at the time of giving of the bond it was well known and understood by all parties that he was limited to make deposits over 50 per cent of the paid-up capital stock of the First National Bank of Harrison, Nebraska, and that the plaintiff, realizing and recognizing that the bond of the plaintiff secured only $25,000.00, took the additional bond of private individuals in the sum of $10,000.00. The plaintiff for reply (Trans. of Rec. p. 27), pleaded that the *People of Sioux County* are not estopped by any of the alleged acts of the treasurer of said county claimed by the defendant to be illegal. Jury waived, case tried to the court on stipulation of facts (Trans. of Rec. p. 39), which stipulation is chiefly a restatement of the pleadings.

The question presented in the district court was purely a question of law, to-wit: Under the statutes of the state of Nebraska, is the surety on depository bonds liable for deposits made in the bank in excess of 50 per cent of the paid-up capital stock in violation of the laws of the state of Nebraska? and (2) can attorney fees for the plaintiff in such action be taxed against the defendant as a part of the costs?

The district court answered both questions in the affirmative.

By appropriate proceedings error was taken to the United States Circuit Court of Appeals for the Eighth Circuit, where the same questions were argued, and in an opinion written by Judge Lewis of the circuit court, filed December 20, 1926, the reasons for a judgment of reversal, with directions to set aside the judgment and vacate the order taxing attorney's fees were given, and the Circuit Court of Appeals on the same day entered its judgment that the judgment of the district court be reversed, that the National Surety Company recover its costs, that the cause be remanded to the district court with directions to set aside the judgment, vacate the order taxing attorney's fees and dispose of the case according to the views expressed in the opinion of the circuit court.

The district court, over defendant's objection, taxed a $3000.00 attorney's fee as part of the costs to be paid by the defendant to the plaintiff. Through all the briefs and arguments of the plaintiff and petitioner here, it has been sought to convey the impression that this law suit involves $30,000.00. However, the fact is that there is only involved the sum of $5000.00. The defense has been at all times that the National Surety Company is liable only for $25,000.00, that is, the amount which the treasurer of

Sioux County may legally have deposited in the bank. So the only dispute is over the excess of $5000.00 which the plaintiff sought to recover. The United States Circuit Court of Appeals has held that the National Surety Company had a right to assume that the county treasurer would obey the law and would only make legal deposits. Considerable argument was made in the lower court and will perhaps be made in this court that the defendant is attempting to plead the illegality of its own contract. This is not true. We have admitted the legality of the contract, but plead that the treasurer violated the law and the contract by depositing more than the contract, as interpreted in the light of the law, said he might.

PROPOSITIONS OF LAW.

I.

Under the laws of Nebraska a county treasurer is prohibited from depositing county moneys in any bank in excess of 50 per cent of the paid-up capital stock of such bank, and for him to do so is made a misdemeanor.

Sec. 6193, Comp. Stat. Neb. 1922.

II.

A statute limiting the amount which a county treasurer may deposit in a bank becomes by construction a part of the depository bond given to protect funds deposited in such bank by a county treasurer.

Cole v. *Myers*, 100 Neb. 480, 160 N. W. 894.

Balco v. *State*, 58 Neb. 557, 78 N. W. 1056.

III.

The surety on a bank depository bond is not liable for more than the amount which the county treasurer was authorized to deposit in the bank, although the bond

was for more than that amount; the liability of the bondsman is limited to the amount legally deposited.

Cole v. *Myers*, 100 Neb. 480, 160 N. W. 894.

In re State Treasurer's Settlement, 51 Neb. 116, 70 N. W. 532.

Territory v. *Mills*, 16 N. M. 555 (1920), p. 325.

Fremont County v. *Fremont County Bank*, 138 Ia. 167, 115 N. W. 925.

Same, second appeal, 145 Ia. 8, 123 N. W. 782.

Yellowstone County v. *First Trust & Savings Bank*, 46 Mont. 439, 128 Pac. 596.

Mills v. *Territory*, 235 U. S. 687.

IV.

A statute limiting the deposit of public funds implies a rule of public policy and the courts will not enforce a contract looking to the breach of such a statute.

Western Indemnity Co. v. *Crafts*, 240 Fed. 1607 (C. C. A. 6th).

V.

The provisions of the Nebraska statute for allowance of attorney fees in actions of this kind are purely provisions for taxation of costs and are not statutes incorporating the provisions thereof in the contract of insurance.

Sec. 7811, Comp. Stat. Neb. 1922.

Nye-Schneider-Fowler Co. v. *Bridges & Hoye Co.*, 98 Neb. 27, 151 N. W. 942, 98 Neb. 863, 155 N. W. 235.

Ward v. *Bankers Life Co.*, 99 Neb. 812, 157 N. W. 1017.

Reed v. *American Bonding Co.*, 102 Neb. 113, 166 N. W. 196.

VI.

The federal statute makes express and exclusive provision for allowance of attorney fees as costs.

Sec. 823 U. S. Rev. Stat., (1375 U. S. Comp. Stat. 1916).

Sec. 824 U. S. Rev. Stat. (1378 U. S. Comp. Stat. 1916).

VII.

Where the federal statute makes express provision as to items of costs the federal courts can not follow the state statute or practice in that matter.

Re Michigan Aluminum Foundry Co. v. *Aluminum Co. of American, et al.*, 190 Fed. 903.

United States v. *Treadwell*, 15 Fed. 532.

O'Neill v. *Kansas City, S. & M. R. Co.*, 31 Fed. 633.

Jerman v. *Stewart*, 12 Fed. 271.

Swancoat v. *Remson*, 76 Fed. 950.

Turllock v. *Mulvane*, 184 U. S. 497, 46 L. Ed. 657.

VIII.

Where congress has legislated and fixed fees that can be allowed as costs, no further fees can be allowed by the court therefor.

Jerman v. *Stewart*, *supra*.

The Baltimore v. *Rowland*, 8 Wall. 377, 19 L. Ed. 463.

IX.

A decision of a federal court upon a statute will not be reviewed because of a subsequent adjudication upon the statute by the state court.

Hoffman v. *Knox*, 50 Fed. 488, 1 C. C. A. 535.

King v. *Dundee Mortgage Investment Company,* 28 Fed. 333.

Burgess v. *Seligman,* 107 U. S. 20, 27 L. Ed. 359.

ARGUMENT.

The discussion of the case divides itself into two major questions. First, is the respondent liable to the county treasurer for funds deposited by the treasurer in excess of 50 per cent of the paid-up capital stock, and second is the defendant in error entitled to have an attorney's fee taxed as part of the costs under the provisions of the Nebraska statutes in an action pending in the Federal Court?

If our view on the first question is upheld by this court as it was by the Circuit Court of Appeals, consideration of the second will not be necessary. Both questions, however, are discussed in the order stated.

Is the plaintiff in error liable for excess funds unlawfully deposited?

That part of Section 6193, Compiled Statutes of Nebraska for 1922, which it is necessary to notice for the purposes of this case is as follows:

> "The treasurer shall not have on deposit in any bank at any time more than the maximum amount of the bond given by said bank in cases where the bank gives a guaranty bond, nor in any bank giving a personal bond more than one-half of the amount of the bond on such bank, and the *amount so on deposit at any time with any such bank shall not in either case exceed fifty per cent of the paidup stock of such bank.*"

(Note—the italics are ours, and to avoid repetition we will say here that all instances of italics throughout this

brief did not appear in the cited cases, but are used for emphasis.)

Aside from the part quoted the section provides at length for the giving of the required depository bonds for the deposit of county moneys by county treasurer and their approval, and provides for the deposit of county moneys in banks out of the county in cases where the county treasurer has more money in his hands than he is authorized to deposit in banks in the county, that is to say, more than an amount equal to one-half of the paid-up capital stock of all banks in the county.

Section 6195 makes it a misdemeanor for a county treasurer to fail or refuse to do or perform any duty required of him by the article.

It is undisputed that at all times from before the bond in suit was executed and filed until the failure of the bank, the First National Bank of Harrison was an authorized depository of Sioux County, Nebraska, moneys, and that the capital stock of the bank was $50,000.00, and it is also undisputed that at the time the bank failed and closed its doors there was on deposit in the bank to the credit of the county treasurer, the sum of $35,395.70.

Under the laws of Nebraska, in consideration of the capital stock of the bank, the county treasurer was authorized to deposit in this bank $25,000.00 and no more. He deposited more than that amount, and brings suit for the entire amount to the extent of the bond, and the question presented thereby is whether the National Surety Company is liable for more than $25,000.00 with interest thereon.

In Nebraska this question has been discussed by the Supreme Court twice. The first time the question arose under the law then existing prohibiting the deposit of public funds in excess of one-half of the amount of the depository bond given by the bank. (*In re State Treasurer's Settlement*, 51 Neb. 116, 70 N. W. 532). In this case the incoming treasurer in a controversy with his predecessor, who had deposited state funds in banks in excess of the amount authorized by law to be deposited, contended that by such unlawful deposits the outgoing treasurer had rendered the entire bond invalid. The court in answering this contention said:

> "The depository law has fixed the maximum which the treasurer shall have on deposit in any bank at the same time at one-half of the amount of the bond executed by the bank. This is a limitation not only upon the *power* of the treasurer to deposit but restricts the bank from demanding a larger sum than one-half of the penal sum named in the bond. Were it not for this limitation, unquestionably a depository bank and the sureties upon the bond would be liable, in case of a breach of its conditions, to the extent of the full penalty written in the bond. If the treasurer exceeds his duty by depositing a larger sum in a depository bank than he is authorized by law to do, it does not affect the liability of such bank and the sureties on its bond to repay the state the *sum deposited therein in strict conformity to the requirements of the depository law* and the accretions thereof."

The same question was again discussed by the same court in *Cole* v. *Myers*, 100 Neb. 480, 484, 160 N. W. 694, the court using the following words:

> "The statute is by construction a part of the depository bond (*Blaco* v. *State*, 58 Neb. 557). In entering into the contract of suretyship the *surety*

had a right to assume that the treasurer would comply with the statute and limit his deposit to $10,000.00. The bond was given to protect legal deposits of the county funds to the contractual and statutory maximum of $10,000.00 and not as security for an illegal deposit in excess of that sum. Both the surety's liability and the debt protected by the suretyship are limited to $10,000.00. In paying the amount of the bond, the bank's surety not only discharged its legal liability, but also discharged the entire debt to secure which the bond was given. The terms of the contract of suretyship, when considered with the statute and with the public duties of the treasurer will admit of no other construction.

"The bank's surety paid the entire debt for which the depository bond was given as security. If injury to the county would result from permitting the bank's surety to share the dividend, the county's loss would not grow out of the debt secured by the depository bond. Such loss, if any, would be traceable to the illegal conduct of the treasurer in making deposits in excess of the penalty named in the bond. For this wrongful act on the part of the treasurer neither the bank's surety nor the county is in anywise responsible. If the treasurer had complied with the law the principal's debt would be paid in full and the amount of the bank's surety to subrogation would be unassailable. In that event the ultimate loss of the bank's surety would be less than the maximum amount for which the depository bond was given. To deny or postpone subrogation because the treasurer for whose wrongful act the bank's surety was not responsible, made overdeposits in violation of law would extend the liability of suretyship."

We again call special attention to the first sentence in the foregoing quotation:

"The statute is by construction a part of the depository bond."

To the same effect see *Blaco* v. *State,* 58 Neb. 557, 78 N. W. 1056. In some of the cases hereinafter referred to the limitation of the deposit was made after the giving of the bond. It is of value to note that the limitation provided by Section 6193, referred to above, is a part of the same section providing for the giving of the depository bond.

Fremont County v. *Fremont County Bank,* 138 Ia. 167, 115 N. W. 925, was a case growing out of the following situation: The bank executed and delivered to the county a depository bond in the sum of $2000.00 to secure deposits of county funds. Several months thereafter the county board fixed the limit of county funds to be deposited in that bank at $1000.00. Over that amount was deposited by the treasurer. From the opinion:

> "Assuming that the bond was good when executed, either as a statutory bond or as a common law obligation, it does not follow that defendant's liability extended to the full amount of the penalty therein named, to-wit, $2000.00, or to the full amount of the deposits made in the bank by the county treasurer.
>
> * * * "If the bond be treated as valid from its delivery in January, the resolution of May 3rd had the effect to reduce the sureties' liability thereunder to the amount named in that resolution. The sureties had the right to rely upon the county treasurer immediately reducing the amount to the sum authorized, and in view of that resolution the county cannot now be heard to say that notwithstanding the neglect of its officers to do their duty toward the sureties it will hold them to the full amount of the loss, not exceeding the penalty named in the bond. The resolution provided that no more than $1000.00 should be deposited in the defendant bank, and the county treasurer if he had done his duty

would have diminished his deposit to that amount; and the *sureties on the bond had the right to rely upon his doing so.* In other words, the amount of their liability was by this resolution reduced to the sum authorized to be deposited in the defendant bank. So that, no matter whether the bond be valid from its inception, or validated by the resolutions of May 3rd, 1904, defendant's liability is limited by the resolution to the sum of $1000.00 and to that extent only may they be liable."

Under the law in Montana the county treasurer was required to have security in double the amount of his deposits of county money. In *Yellowstone County* v. *First Trust & Savings Bank*, 46 Mont. 439, 128 Pac. 596, the treasurer had secured a bond of $25,000.00 to protect deposits in the bank, but had deposited $33,000.00. The court held that but $12,500.00 was protected by the bond, and that the balance was unlawfully deposited and was a trust fund. *In re Treasurer's Settlement, supra,* was cited and approved. In deciding the case the court said:

"With the acceptance of this bond for $25,000.00 then, the treasurer could lawfully keep on deposit with this bank county funds to the amount of $12,500.00, and the deposit of such funds to that amount would constitute a general deposit authorized by Section 3003 above, and to that extent the county would give its consent to become a general creditor of the bank, and that its funds to that amount might become the funds of the bank to be commingled with its other funds and assets. At the time this bond was given it constituted good and sufficient indemnity for the deposit of the county funds to the extent of $12,500.00. * * *

"The fact, however, that the deposit of county's funds to the extent of $12,500.00 was secured, does

not reflect in the least upon the status of the $20,500.00 kept on deposit in this bank without security, and in violation of law. The act of the treasurer in keeping this excess on deposit without the security required by Section 3003, is denounced by Section 8592, Revised Codes, as a felony; and the treasurer and the bank officials are chargeable with knowledge that the use to which these county funds were thus put was altogether illegal and wrongful, and that the county, the rightful owner of such excess, did not consent to such use and did not part with its title to the funds thus employed (*State* v. *Thum*, 6 Idaho 323, 55 Pac. 858). The only method by which the county could give its consent that its funds might be placed on general deposit was by speaking through the legislature as it did in Section 3003 above. To the extent that the provisions of that section were complied with, it gave its consent, and beyond that it did not and could not go."

And in the same case:

"The deposit of $20,500.00 excess, without security was wrongful and unlawful. The county did not consent thereto, never parted with its title to such funds, and the treasurer and the bank officers knew of these facts, being chargeable with knowledge of the law. The bank was an active participant in the wrong, and the result follows as of course that as to such excess the bank held it as a trustee *ex maleficio*, for the use and benefit of the county (*State* v. *Thum*, above). *Wolfe* v. *State*, 79 Atl. 207, 58 Am. Rep. 590; Meecham on Public Officers, 922.

"If the county treasurer had performed the duties of his office as required by law he would have withdrawn this $20,500.00 from the bank on March 1, 1910, if not earlier, and the fact that he did not do so only serves to demonstrate that by his wrongful act the county funds were made to swell the apparent assets of the bank to that amount. No one will be

heard to say that these funds wrongfully in the bank should not be withdrawn; no one can be injured by having that done which ought to have been done."

"The legislature having designated the particular instance, and the only one, in which the county's funds may be placed on general deposit, it was not *within the power* of anyone else to consent to a general deposit of such funds under any other circumstances."

Idem.

Territory v. *Mills*, 16 N. Mex. 555, 120 Pac. 325: This was a case where the county treasurer deposited $20,000.00 where he was authorized to deposit but $10,000.00. The court held that bond secured by $10,000.00, saying:

"Whatever deposit was made by the treasurer above the amount to which the bank was entitled under the law was made by him as an individual depositor upon his own responsibility, for which, in case of loss, he would be liable under his official bond; but such excessive deposit could not have been made with reference to the bond now sued on and could not affect the liability of the surety any more than a deposit made by another individual. This position not only commends itself as a matter of reason, but is well supported by authorities."

This case was later affirmed by the United States Supreme Court and the opinion is reported in 235 U. S. 687.

Western Indemnity Co. v. *Crafts*, 240 Fed. 1, was a suit on an indemnity agreement given upon the execution of a depository bond to protect deposit of public moneys with a trust company in violation of law. The court, in denying the recovery, says:

"It is further contended that since the statute does not in terms make it a crime to receive a deposit of

money belonging to the state, nor expressly denounce as unlawful a bond given to secure the repayment of the money, it must result that the indemnity contract in suit cannot be regarded as unlawful. The learned counsel endeavor to establish this proposition by decisions which were applicable, are of course authoritative (citing cases), but we do not regard these decisions as applicable here. Upon the facts admitted by the demurrer to the present petition it cannot reasonably be doubted that, when the indemnity contract in issue was executed and delivered, all the parties named in the instrument knew it was an essential step in a design to induce the treasurer of the state of Ohio to deposit moneys of the state with the Euclid Company, and obviously the parties were chargeable with notice of the statute which denounced such an act of the treasurer as a felony. In saying that this was the purpose of the indemnity contract, we have in mind that the state treasurer was not a formal party to the contract, but upon the admitted facts it is perfectly evident that the Federal Company would not have indemnified the state treasurer by becoming surety upon the Euclid Company's bond unless the defendants had in turn secured the Federal Company by this indemnity contract. Thus it is sought to enforce a contract which was executed and received with the plain intent and purpose to promote a scheme to divert state moneys from the state treasury to the Euclid Company, and while it is true, as counsel insist, that the statute did not in terms make it a crime to receive and secure deposits of state moneys, still the inhibition of the statute is broad enough to forbid a scheme looking to such a diversion of state moneys. The statute clearly implies a rule of public policy which is condemnatory of such a scheme, and the effect of this was to taint the very consideration upon which the indemnity contract was founded."

Considerable was made at the trial and in the Circuit Court of Appeals of the fact that to comply with the depository law would be difficult for the county treasurer and great efforts have been made toward enlisting the sympathy of the court toward the people of the county of Sioux who are said to be without guilt and to be the victims of the decision of the Circuit Court of Appeals; and that effort has gone so far that this case has been brought into this court under a false title. The people of the county of Sioux or Sioux County will not suffer. The county treasurer is by law required to file an official bond which protects the county in situations such as this.

Great reliance has been placed on the decision of the Nebraska Supreme Court in *State* v. *State Bank of Anselmo*, on rehearing, 111 Neb. 136, 198 N. W. 1018. This opinion on the rehearing held that the guaranty fund of the state of Nebraska was liable for excess deposits of county funds. This decision was based upon the proposition that the guaranty fund statute did not put a limitation on the amount which might be deposited by the county treasurer in a state bank, because the Nebraska statute provided that no state bank which had complied with the provisions of the guaranty fund act should be required to give security, but that depository funds should be secured in the same manner that private funds are secured.

In the first opinion the court held:

> "If, then, the limitation is still effective, it follows as a matter of course that the deposits made by the treasurer in the bank in excess of $7500.00 were in violation of the express terms of the statute. The question then arises: Is the guaranty fund liable for the payment of the excess? The liability of the guaranty fund is somewhat analogous to the liability of a suretor or guarantor."

And it was held that the guaranty fund was not liable for the excess. It will be noted that the court in the first opinion said that this rule applied if the limitation was still effective. In the second opinion it was held that it "might with good reason be urged that the legislature intended to repeal the provisions of the depository law in so far as it affected state banks." Three of the judges of the Nebraska Supreme Court dissented from the second opinion, adhering to the first, and even in the second opinion the conclusions quoted above from the first opinion were not rejected, but were avoided.

The inapplicability of the Anselmo case is further shown by the fact that very recently the Supreme Court of Nebraska has held in the case of *Rogers, Receiver*, v. *Natl. Surety Co.*, — N. W. —, that the guaranty fund is a guarantor and not a surety. There is no reason, therefore, for applying the rules applicable to a guarantor of deposits in a state bank to the situation of a surety of deposits in a national bank.

Has the Supreme Court of Nebraska reversed itself and if so, has such reversal any effect on this case?

Since this case was decided by the Circuit Court of Appeals the Supreme Court of Nebraska has decided the case of *Scotts Bluff County* v. *First National Bank*, 212 N. W. 617. This opinion was filed March 1, 1927. The opinion and judgment in the case at bar were filed December 20, 1926, in the Circuit Court of Appeals.

The case referred to appears on its face to sustain the contention of the petitioner here. However, it will be noted that the bond was for $5000.00, while the treasurer might lawfully have deposited $12,500.00. That at the time the bond was given there was $50,000.00 on deposit

of public moneys in the bank; that numerous other sureties had executed bonds, none of which were over $12,500.00. The defendant in that case was not required to pay more than the amount which the treasurer might lawfully have deposited; in the first place, there was no way of ascertaining which part of the $50,000.00 was the unlawful excess, and in the second place the surety knowingly executed its bond after the law had been violated.

Much of the argument of the court in the opinion was unnecessary to the decision of the case.

Furthermore, prior to that opinion, it may be said that the Supreme Court of Nebraska had held that a surety on such a bond was not liable for excess funds unlawfully deposited, as is shown by the cases cited in this brief.

Counsel for respondent would tell this court that the question had never been decided in Nebraska. For the purpose of this part of the argument it is immaterial, for it is a well settled rule that the courts of the United States will not review a judgment of the lower Federal court because such judgment is inconsistent with a later decision of the higher court of the state. If the state courts have not construed the statute the Federal court will adopt their own interpretation of the law applicable to the case, and such interpretation will not be disturbed because the state court later adopted its interpretation inconsistently with that of the Federal court. Much more so where the state court has construed the statute and the Federal court has adopted the state court's construction. In such case the rule is clear that the appellate court will not reverse the Circuit Court of Appeals, because the state court may have reversed it.

It has been held:

> "When contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal courts will adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued."
>
> 25 C. J. 843.

Literally hundreds of cases are cited in support of this text, decisions of this court and almost every Federal court of the land.

This rule was very ably stated by Mr. Justice Bradley in *Burgess* v. *Seligman*, 107 U. S. 20, 27 L. Ed. 359, as follows:

> "When the transactions in controversy occurred, and when the case was under the consideration of the circuit court, no construction of the statute had been given by the state tribunals contrary to that given by the circuit court. The Federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with and not subordinate to that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the con-

> struction of state constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment, as they also always do in reference to doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions or when there has been no decision of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued."

This rule is, of course, well recognized, and we believe further citation to be unnecessary. The contracts and transactions involved herein were entered into while the decision of the state of Nebraska in *In re State Treasurer's Settlement*, 51 Neb. 116, 70 N. W. 532; *Cole* v. *Meyers*, 100 Neb. 480, 160 N. W. 694, and others were assumed and thought to be the settled law in this state. The Circuit Court of Appeals, after an examination of the Nebraska authorities, decided that such was the law in this state. And as was well said by Judge Lewis in the opinion of the lower court the position that a depository bondsman is liable only for legal deposits is "reasonable, just and based on sound principle." Numerous other courts have expressed the same views and it is respectfully submitted that this court should not reverse a decision based on sound conclusions and a decision in conformity with the then setled law of Nebraska, because the Supreme Court of Nebraska has reversed itself since the transactions involved occurred and since the Circuit Court of Appeals entered its judgment.

Right To Tax Attorney's Fees as Part of the Costs.

When the district court entered judgment against respondent, defendant there, it included in the judgment the following allowance of attorney's fees (Trans. of Rec. p. 31):

> "It is further ordered by the court that the sum of $3000.00 be and the same is hereby allowed to the plaintiff for said E. D. and F. A. Crites, as attorney's fees and that the clerk of this court do tax the same as costs against the said defendant in addition to said judgment, said sum to bear no interest, to which order the defendant excepts."

The Circuit Court of Appeals reversed that part of the judgment of the district court and remanded the cause with directions to vacate that part of the judgment.

Complaint is here made of this.

We will first discuss the question as it was discussed in our brief in the Circuit Court of Appeals as we believe the views therein expressed, which were in great part adopted by the Circuit Court of Appeals in its opinion (Trans. of Rec. pp. 59-63), are a clear statement of our contention on this question. We will then call attention to the ridiculousness and fallacy of the answer to this contention contained in the brief of petitioner.

Presumably the district court did this under the authority of Section 7811, Compiled Statutes of Nebraska for 1922, which is as follows:

> "In all cases where the beneficiary or other person entitled thereto brings an action at law upon any policy of life, accident, liability, sickness, guaranty, fidelity, or other insurance of a similar nature, or upon any certificate issued by a fraternal beneficiary

> association, against any company, person or association doing business in this state, the court, upon rendering judgment against such company, person or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as part of the costs, and if such cause is appealed the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings."

It therefore becomes necessary to decide: (1) The nature of this statutory provision for attorney fees, whether it is something which is read into the contract of insurance or whether it is really a matter of costs and relates to the remedy; (2) If it is a matter of costs, can the state statute govern in the Federal court?

As to the question whether or not this is part of the contract of insurance or is a statutory provision for costs not only does the express wording of the statute that the same is "to be taxed as part of the costs," but the repeated decisions of the Supreme Court of the state of Nebraska, construing the statute, leave no doubt. The question was first considered in the case of *Nye-Schneider-Fowler Co.* v. *Bridges, Hoye & Co.*, 98 Neb. 27, 151 N. W. 942, 98 Neb. 863, 155 N. W. 235. The question was squarely presented. The suit was on a bond given by a contractor and the Lion Bonding & Surety Company, a surety company operating in the state of Nebraska. The bond was entered into prior to the passage of the act hereinbefore cited. The suit was brought after the passage of the act. In the first holding of the case reported in 98 Neb., page 27, the supreme court evidently took the view that the act was simply to be read into and become a part of the contract of insurance thereafter made and refused to allow any attorney fees, saying:

> "The act of 1913 is quite analogous to the act of 1873, and by those decisions the allowance of attorney's fees under the statute depends upon the existence of the statute at the time of entering into the contract. It seems clear that the legislature by the act of 1913 did not intend to impair the obligations of existing contracts."

Rehearing was, however, allowed, and the opinion of the court on rehearing, reported in 98 Neb. 863, 155 N. W. 235, recedes from the former opinion and expressly holds that the statute applied to contracts entered into before passage of the statute. In order to do this it was necessary to expressly decide that the statute provided for an allowance of costs, that it related to the remedy only, and therefore applied to contracts entered into prior to the passage of the statute. The court says:

> "If the new statute adds an additional burden to the contracting parties that without the statute would not exist, it has generally been considered that such statute could not be applied to a contract entered into before its enactment. However, in *Security Co. v. Eyer*, 36 Neb. 507, in determining the question here presented, it is said, 'Attorney's fees in states where they are allowed by the court to the successful party are in the nature of costs and are taxed and treated as such. They are no part of the judgment proper.' In *Insurance Co. of North America* v. *Bachler*, 44 Neb. 549, 565, in deciding the same point, it is said, 'We know of nothing in the Constitution which prohibits the legislature from enacting that the successful party in litigation may recover a judgment against his adversary for the amount of the costs expended or accrued by him in the prosecution of such suit, nor do we know of anything that prohibits the legislature from including in the term costs a reasonable attorney's fee.'

"These decisions are adhered to in *American Fire Ins. Co.* v. *Landfare*, 56 Neb. 482, and *Home Fire Ins. Co.* v. *Weed*, 55 Neb. 146. If these decisions are inconsistent with *White* v. *Rourke*, 11 Neb. 519, and *Bond* v. *Bolby*, 17 Neb. 491, and other cases following them, we do not feel at liberty to disregard the later cases, and must therefore hold that attorney's fees under this statute, as being a part of the costs of the litigation, relate to the remedy, and that it was the intention of the legislature that this statute providing for attorney's fees in such cases should apply, in all actions upon such contracts, whether the contract was made before or after the enactment of the statute."

This decision has since been adhered to and is the law in the state of Nebraska.

Ward v. *Bankers Life Co.*, 99 Neb. 812, 157 N. W. 1017.

Reed v. *American Bonding Company*, 102 Neb. 113, 166 N. W. 196.

It thus clearly appears that this statute is purely a matter of allowance of costs. It appears to be beyond controversy that the same being a matter of costs purely, if the federal statute expressly provides for the costs, the federal court can make no allowance except that allowed by the federal statutes.

The federal statute makes express provision on the question of attorney fees to be taxed as costs. Section 823 of the Revised Statutes, being Section 1375, United States Compiled Statutes, for 1916, provides as follows:

"The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and

printers in the several states and territories, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the government and such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective states, or may be agreed upon between the parties."

And Section 824, Revised Statutes, being Section 1378, United States Compiled Statutes for 1916, itemized the attorney fees and allowance to which an attorney is entitled. The particular portion of the section applying to the case at bar being as follows:

"In cases at law when judgment is rendered without a jury, $10.00."

The federal statute making express and exclusive provision for the allowance of attorney fees as costs, the district court obviously was in error in allowing any additional attorney fees as costs because of the state statute on this matter.

In *Michigan Aluminum Foundry Co.* v. *Aluminum Company of America*, 190 Fed. 904, the court says, on the question of allowing attorney fees:

"If acts of congress make specific provisions for costs, they control. If they make no provision for certain kinds of costs, the provisions, if any, of the state statutes may be followed (*Scatcherd* v. *Love*, 166 Fed. 53, 91 C. C. A. 639, and cases cited). At least if they do not result in injustice in a particular case (*Primrose* v. *Fenno*, 113 Fed. 375). Such seems to be the prevailing doctrine at this time.

"Sections 823 and 824, Revised Statutes (U. S. Comp. Stat. 1901, p. 632), distinctly provide that

attorneys shall be allowed certain fees, and no others. On the subject of attorney fees this act controls. It makes no provision for attorney fees on motions. Hearing on a motion is not a final hearing of the cause, upon which the statutory docket fee may be taxed. No attorney fee can be allowed on the motion."

In *United States* v. *Treadwell,* 15 Fed. 532, the court says:

"This section is taken without change from the act of 1853. By Section 823, above quoted, it is provided that the fees following 'shall be taxed, except in cases otherwise expressly provided by law'; i. e., by some law of congress, not of the several states. Taking the two sections together, therefore, it would seem to follow necessarily that the fees referred to in Section 823 must be taxed in favor of the 'prevailing party,' and 'against the losing party,' in all cases, 'except where otherwise expressly provided by law.'

"The language of Section 823, by its natural meaning and import, seems to me plainly to cover the whole question of the right to costs; for it declares that the following fees 'shall' be allowed to attorneys, etc., except in cases expressly provided by law, i. e., the attorneys of the prevailing party shall be entitled to costs in all cases, 'unless otherwise expressly provided by law.'

"I cannot perceive any reason for the change in the phraseology of Section 823 from the language of the act of February 26, 1853, except for the purpose of making this definite provision as to the right to costs, which the act of 1853 did not do. If such is the proper interpretation and construction of Section 823, then it supersedes the law and the practice of the states in reference to the right to recover costs, since those laws are applicable only in the absence of any law of congress on the same subject. Section 721."

In *Jerman* v. *Stewart*, 12 Fed. 273, Judge Hammond, in deciding a motion to retax costs, says:

> "I do not wish to depart from the decisions which hold that where congress has legislated and allowed no fees, none can be allowed by the courts on the doctrine of reasonable compensation, and where this plain statute says that the officers enumerated shall receive certain fees and none other, that the courts cannot enlarge them."

The whole matter, we think, is succinctly stated by Judge Clifford, which opinion in *The Baltimore* v. *Rowland*, 8 Wall. 377, 19 L. Ed. 463, is as follows:

> "Fees of the attorney and counselor were prescribed by the first section of the act. They were a stated fee of $3.00 for drawing and exhibiting a libel, claim or answer in each cause; $3.00 for drawing interrogatories and $3.00 for all other services in any one cause; $9.00 only could be taxed for the services of an attorney or counselor, but the fourth section of the act provided that there be allowed and taxed in the federal courts in favor of the parties obtaining judgments therein, such compensation for their travel and attendance, and for attorney and counselor's fees, except in the district courts, in causes of admiralty and maritime jurisdiction, as are allowed in the supreme or superior courts of the respective states. Passed to continue in force only for the year, and from thence until the end of the next session of congress thereafter, it was suffered to expire, but it was renewed by the act of the 31st of March, 1796, and was continued in force two years longer, and to the end of the next session of congress.
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> "Detailed provision was made by the subsequent act of the 28th of February, 1799, for compensation of marshals, clerks, district attorneys, jurors, witnesses, and criers, but the special provision allowing counsel fees was dropped.

"Even while it remained in force, it did not authorize such an allowance in a case like the present, as cases of admiralty and maritime jurisdiction in the district courts were expressly excepted from the operation of the provision. Ordinary costs in admiralty suits were doubtless taxed under that act, as if it was in force long after it had expired, but it never furnished any authority to charge counsel fees in the district courts, but if it did, and if it had not expired, it would be repealed by the present law.

"Fees and costs allowed to the officers therein named are now regulated by the act of the 26th of February, 1853, which provides, in this first section, that in lieu of the compensation now allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners and printers, the following and no other compensation shall be allowed:

"Attorneys, solicitors and proctors may charge their clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed as costs against the opposite party, as an incident to the judgment, for their services, except the cost and fees therein described and enumerated (10 St. At. L. 161). They may tax a docket fee of $20 on a final hearing in admiralty, if the libelant recovers $50, but if he recovers less than $50, the docket fee of the proctor shall be but $10.00. *The Canton*, 21 Law Rep. 473; *The Liverpool Packet*, 2 Sprague 37; *The Connestago*, 2 Wall. Jr. 116."

In *O'Neil* v. *Kansas City S. & M. R. Co.*, 31 Fed. 663, the court had under consideration the question of whether a party could have witness' fees taxed as costs that he had not paid. The practice in the state courts of Tennessee being that he could. The holding of the court on this point is reflected in the second paragraph of the syllabus as follows:

> "The federal statutes regulate the matter of fees and costs in the courts of the United States, and the statutes and practice of the state are not binding in matters comprehended by the federal statute. Hence any state practice of indulgence of credit for the fee of litigation until final judgment for costs, does not obtain in the federal courts, where the act of congress prescribed a specific regulations on the subject. The Tennessee practice of giving credit for fees until final judgment, and return of *nulla bona* against the losing party, is a voluntary indulgence by the persons entitled to the fees, and not perhaps a strict right under the statutes of the state."

In *Swancoat* v. *Remsen*, 76 Fed. 950, Circuit Judge Lacombe says:

> "The section of the United States Revised Statutes to which plaintiff refers adopts the practice of the state courts, so far as may be; but it does not adopt the state fee bill, either for costs or for official fees."

The extent to which the federal courts go in refusing to follow state practice as to allowance of attorney fees as a matter of costs is well illustrated in the case of *Turlock* v. *Mulvane*, 184 U. S. 497, 46 L. Ed. 657. In that case an action for injunction was started in the Federal Court of Kansas and an injunction bond given. Later the temporary injunction was dissolved. An action was brought on the injunction bond in the state court. The question presented was whether or not in the action in the state court could attorney fees be allowed as one of the elements of damage under the bond. The Supreme Court of Kansas held that this was an express item of damage and no question is made but what under the Kansas practice attorney fees were expressly allowed as an element of damage on injunction bonds. On error to the Supreme Court of the United States it was by

the court, in an opinion by Justice White, held: (1) That under the equity practice prevailing in the federal courts attorney fees were not expressly allowed to the adverse party when under an injunction bond. (2) That this being the law, even though under the Kansas practice, attorney fees were an express determination of damages, yet on an action in the state court on the bond no attorney fees could be considered because they would not be allowable in the federal court. The court quotes with approval from the case of *Bein* v. *Heath,* 12 How. 168, 13 L. Ed. 938, as follows:

> "Now, there is manifest error in subjecting the parties to an injunction bond, given in a proceeding in equity in a court of the United State, to the laws of the state. The proceeding in a circuit court of the United States in equity is regulated by the laws of congress and the rules of this court made under the authority of an act of congress. And the ninetieth rule declares that, when not otherwise directed, the practice of the High Court of Chancery in England shall be followed. The eighth rule authorizes the circuit court, both judges concurring, to modify the process and practice in their respective districts. But this applies only to forms of proceeding and mode of practice, and certainly would not authorize the adoption of the Louisiana law, defining the rights and obligations of parties to an injunction bond. Nor do we suppose any such rule has been adopted by the court. And if it has, it is unauthorized by law, and cannot regulate the rights or obligations of the parties.
>
> "And when an injunction is applied for the circuit court of the United States sitting in Louisiana, the court (may) grant it or not, according to the established principles of equity, and not according to the laws and practice of the state in which there is no court of chancery, as contradistinguished from a court of common law. And they require a bond,

or not, from the complainant, with sureties before the injunction issued, as the court, in the exercise of a sound discretion, may deem it proper for the purposes of justice. And if, in the judgment of the court, the principles of equity require that a bond should be given, it prescribes the penalty and the condition also. And the condition prescribed by the court in this case, but which was not followed, is the one usually directed by the court.

"In proceedings upon such a bond, the court would have no authority to apply to it the legislative provisions of the state.

"Indeed, the principles announced in *Bein* v. *Heath* were in effect, but the reiteration of the doctrine previously established by this court, that a bond given in pursuance of a law of the United States was governed, as to its construction, not by the local law of a particular state, but by the principles of law as determined by this court, and operative throughout the courts of the United States. *Cox* v. *United States*, 6 Pet. 172, 8 L. Ed. 359; *Duncan* v. *United States*, 7 Pet. 435, 8 L. Ed. 739."

In this connection we have not overlooked the numerous cases in the Supreme Court of the United States discussing the question of the constitutionality of such statutes as the Nebraska statutes allowing attorney fees in suits against insurance companies. So far as we know, none of these various cases determine or discuss whether or not these statutes would apply to suits in the Federal court. Nor have we overlooked the case of *Williamson* v. *Liverpool Insurance Company*, 141 Fed. 54, or *Spring Garden Insurance Company* v. *the Amusement Syndicate Co. et al.*, 178 Fed. 519.

It appears that attorney fees were allowed on suits on insurance policies in this circuit. Neither of these cases discuss or in any way refer to the question of whether or

not these respective statutes were applicable in the Federal court, in view of the express provision of the Federal statute as to attorney fees, and are therefore not authorities on the proposition which we raise and, as a matter of fact, each of the cases could be decided as they were, even if our contention as to the law on the question of costs is adopted.

In *Williamson* v. *Insurance Company, supra*, this court held that a suit originating in Missouri in the Federal court on an insurance policy, the Federal courts would allow an attorney fee. The case does not discuss the question of the applicability of the state statute to the Federal court and the case is decided purely on the question of the constitutionality of the Missouri statute. If, however, the question had been raised the case could have been decided in the same way. The Missouri statute is not a question or proposition of costs as is the Nebraska statute, but is a statute which becomes a part of the contract of insurance. This distinction is clearly shown by the fact that the Missouri statute does not apply to policies issued prior to its enactment (*Thompson* v. *Traders Ins. Co.*, 169 Mo. 12, 68 S. W. 889), while as heretofore shown the Nebraska statute does, and is sustained purely as a cost statute. The case of *Spring Garden Insurance Company* v. *Amusement Syndicate Co., supra*, involved the Kansas statute as to attorney fees being allowed in suits on insurance policies. We have been unable to ascertain whether the Kansas court follows the Missouri or Nebraska interpretations of this statute. If it follows the Missouri interpretation obviously the attorney fees could be allowed as a part of a contract of insurance even though denominated as costs in the statute. The further fact, however, is to be noted in connection with this case, that the suit in the Federal court was an action to enjoin

several suits commenced in the state court on insurance policies and on refusal to allow the injunction the Federal court granted the same relief that the party would have obtained in the state court under the suits there commenced.

This case likewise does not discuss or determine the question presented herein as to the applicability of the state statute to proceedings in the Federal court.

A Short Discussion of Petitioner's Views.

In their supplemental brief counsel urges the doctrine of *Cole* v. *Meyer*, 160 N. W. 894, that the statute is by construction a part of the depository bond upon this court as being applicable to a question of the taxation of costs. They attempt in one breath to admit that while this statute allowing attorney's fees is one fixing costs, as squarely held in *Nye-Schneider-Fowler Company* v. *Bridges-Hoye*, *supra*, in cases like that case where the contract was made before the passage of the statute, yet they say if the statute had antedated the contracts it would have been treated as part of the contract. This is ridiculous. If the contract was made before the statute the statute is applicable because it provides for costs; if made after the statute it applies because the statute does not provide for costs. Certainly your honors cannot conceive of the Supreme Court of Nebraska doing anything like that.

And counsel says that under the doctrine of *Cole* v. *Meyer*, *supra*, this statute providing for costs became a part of the depository bond. Under what theory they insist a statute on court costs becomes a part of the bond we cannot understand. If it is based on the theory that the liability for such costs is contractual, we reply that the law of Nebraska recognizes no right of parties to contract for court costs or attorney's fees.

If the Supreme Court of Nebraska will not enforce a contract for attorney's fees incorporated right in the contract, certainly it will not read into the contract a statute providing for attorney's fees to be taxed as costs and enforce such provision as a contractual proposition.

In *Security Co.* v. *Eyer*, 36 Neb. 507, 54 N. W. 838, the Supreme Court of Nebraska held:

> "Attorney's fees in states where they are allowed by the court to the successful party are in the nature of costs and are taxed and treated as such. They are no part of the judgment proper."

And in the syllabus by the court it is said:

> "The said provision in the note for attorney's fees being contrary to the settled law of this state will not be enforced."

And the Supreme Court of Nebraska has adhered to this rule and refused to recognize the right of parties to contract for attorney's fees or other court costs.

Considerable argument is made to show that the statute does not provide for costs. The argument is rambling and fails to show any reason why *Nye-Schneider-Fowler* v. *Bridges-Hoye, supra; Ward* v. *Bankers Life Co., supra*, and *Read* v. *American Road Company, supra*, the latter being later than any of the decisions cited by counsel, do not mean what they say.

Furthermore, attention is called to the case of *Williams* v. *Insurance Company*, 141 Fed. 54, a case in which costs of attorney's fees under state statute of Missouri was allowed in the Federal court. Counsel asks how that could have been allowed except as costs. And they further state that the Missouri statute does provide for an attorney's fee to be taxed as costs, although the word "costs"

is not used in the statute, but we have already cited authorities in this brief showing that the Supreme Court of Missouri has passed upon the statute and squarely held that it was not costs. This case was heard in the Circuit Court of Appeals before one of the judges of the district court for the district of Missouri who was thoroughly familiar with the Missouri statute in question.

Again counsel states that the fact that *Spring Garden Insurance Co.* v. *Amusement Co.*, 178 Fed. 519, is applicable because there is no distinction between the rule applied as to costs in an equity case and a case on the law side of the court. If this be so, why did congress use this language in Section 8240, Revised Statutes:

> "In cases at law when judgment is rendered without a jury, $10.00 * * *

We call attention to these fallacies. We believe your honors will perceive that the entire argument of counsel for petitioner is equally fallacious.

Amount of Attorney's Fees.

The district court allowed a fee of $3000.00. Even if it were to be held that an attorney's fee should be taxed, this fee fixed by the district court is exorbitant. As we have said, only $5000.00 was involved. Counsel quotes authorities that 10 per cent is a fair fee in cases of this kind. If they were entitled to anything, it would not be more than $500.00.

It has been contended by petitioner that they thought the suit was for $30,000.00. Contrast that with the stipulation (Trans. of Rec. p. 42):

> "That plaintiff has demanded payment of the amount of said bond, together with interest from the date of the closing of the bank of the defendant

National Surety Company, but same has been entirely refused. The defendants, however, at all times have been ready, able and willing to pay their admitted liability of $25,000.00 under said bond, which plaintiff has at all times refused to accept; but no actual tender of any amount has ever been made."

No extraordinary effort was required in the trial of the case; there was no actual trial work in connection with it, and no evidence was introduced except the stipulation. The stipulation, with the exception of the exhibits, covers less than five pages, and we earnestly insist that this record shows on its face an allowance of $3000.00, if it can be said to be proper, is greatly excessive.

On these considerations it is respectfully urged that the judgment of the Circuit Court of Appeals in the case of *National Surety Company, Plaintiff in Error,* v. *Lyons,* be affirmed.

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SUPPLEMENTAL LIST OF POINTS AND AUTHORITIES

A contract of insurance is nothing but an agreement which must be given a just and rational interpretation. Written agreements are made to express the intention of the parties. Agreements are construed to ascertain and enforce that intention. From a consideration of the situation of the parties, the writing, its purpose, and the surrounding conditions, courts endeavor to ascertain what the parties intended to agree to do—upon what sense or meaning of the terms they used their minds actually met.

U. S. Fidelity & G. Co. v. Board, 145 Fed. 144, 148.
Accumulator Co. v. Dubuque St. Ry. Co., 64 Fed. 70, 74.
City of Salt Lake v. Smith, 104 Fed. 457, 462.
Fitzgerald v. First Nat. Bank, 114 Fed. 474, 482.
Merriam v. U. S., 107 U. S. 437, 27 L. ed. 531.
U. S. v. Peck, 102 U. S. 64, 26 L. ed. 243.

The bond in this case must be read as though there were incorporated in it the language of Section 6193, Comp. Stat. Nebraska 1922, providing that "the amount so on deposit at any time with (the First National Bank of Harrison, Nebraska) shall not exceed fifty per cent of its paid up capital stock."

Cole v. Myers, 100 Neb. 480, 160 N. W. 894.
Balco v. State, 58 Neb. 557, 78 N. W. 1056.
People v. Metropolitan Surety Co., 211 N. Y. 107, 113.
McCracken v. Hayward, 2 How. U. S. 608.
U. S. Fidelity & G. Co. v. Fultz, (Ark.), 89 S.W. 93, 95.
McHenry County v. Northern Trust Co. (N. Dak.), 200 N. W. 888.
City of Dickinson v. Dakota Nat'l Bank, 202 N. W. 277, 279.

Where there are statutory provisions relating to the deposit of public funds there is no authority to make deposit except to the extent and on the terms and conditions prescribed.

Van Vissiger v. Clay County, 54 Minn. 555, 56 N. W. 251.

Yellowstone County v. Billings, etc., Bank, 46 Mont. 439, 128 Pac. 596.

Lancaster County v. State, 97 Neb. 95, 149 N.W. 331.

Where there is an authorized general deposit with a depositary of public funds the resultant relation is that of debtor and creditor.

In re Salmon, 145 Fed. 649.

Caldwell v. King, 84 Iowa 228, 50 N. W. 975.

Yellowstone County v. Bank, 46 Mont. 439, 128 Pac. 596.

In re State Treasurer's Settlement, 51 Neb. 116, 70 N. W. 532.

State v. Bartley, 39 Neb. 353, 58 N. W. 172.

An unauthorized deposit constitutes a trust fund where the depositary knows that the fund belongs to the public.

Centralia v. U. S. Nat. Bank, 221 Fed. 755.

Blaine Co. v. Fuld (Ida.), 171 Pac. 1138.

In re Nampa Bank, 29 Ida. 166, 157 Pac. 1117.

Green v. Custer Co.. 8 Ida. 721, 71 Pac. 115.

State v. Thum, 6 Ida. 323, 55 Pac. 858.

Brown v. Sheldon State Bank, 139 Iowa 83, 117 N. W. 289.

Page Co. v. Rose, 130 Iowa 296, 106 N. W. 744, 5 L. R. A. N. S. 886, 8 Ann. Cas. 114.

Myers v. Clay Co. Bd. of Education, 51 Kans. 87, 32 Pac. 658.

Yellowstone Co. v. Billings, etc., Bank, 46 Mont. 439, 128 Pac. 596.

State v. Midland State Bank, 52 Neb. 1, 71 N.W. 1011.

The action of the treasurer in placing with the bank funds in excess of the legal limit was illegal and wrongful. The county did not consent to such use of its funds and did not part with title thereto. Such illegal use of funds was not a "deposit" as that term is used in the bond, since it did not make the bank a debtor to the county, but a trustee *ex maleficio.*

Yellowstone Co. v. Bank, 46 Mont. 439, 128 Pac. 596.

State v. Thum, 6 Idaho 323, 55 Pac. 858.

"No treasurer shall be liable on his bond for money on deposit in bank under and by direction of the proper legal authorities." Section 6196 Comp. Stat. Nebraska, 1922. This was construed in Lancaster v. State, 97 Neb. 95, 99, 149 N. W. 331, as meaning that "the county treasurer is not liable for deposits made if the bank had given a bond as specified in the act," unless, as was held in Hall County v. Cronin, 79 Neb. 424, 112 N. W. 561, "the amount of such deposit exceeds the sum which might lawfully be deposited."

"In entering into the contract of suretyship the surety had a right to assume that the treasurer would comply with the statute"; Cole v. Myers, 100 Neb. 480, 484, 160 N. W. 894; that he would do his duty in restricting deposits, Fremont County v. Fremont County Bank, 138 Iowa 167, 115 N. W. 925; that he "would obey the civil and criminal statutes", McHenry County v. Northern Trust Co. (N. Dak.) 200 N. W. 888.

In the case at bar it can be assumed, in construing the bond, that the respondent was willing to guarantee deposits under a legal depositary relationship up to the full amount of its bond, but it cannot be assumed that it intended "to stand sponsor for an illegal relationship", in any amount.

City of Dickinson v. Dakota National Bank (*N. Dak.*), 202 N. W. 277, 279, 280.

Where a contract was open to two constructions by one of which it would be lawful and the other unlawful, the former construction should be adopted.

Hobbs v. McLean, 171 U. S. 567, 29 L. ed. 940, 944.

The construction of the bond in this case is not to be controlled by the construction placed by the Supreme Court of Nebraska on some other bond even though written under the same statute. The question in each case is as to the intention of the parties to the bond, and not as to the meaning of the statutory provision limiting lawful deposits in a depositary bank to one half its paid up capital stock, which provision is so plain that construction thereof is wholly unnecessary.

Michigan Central Railroad Co. v. Myrick, 107 U. S. 27 L. ed. 325.

To construe the bond in this case as liable for deposits in excess of the statutory limit would tend to encourage such unlawful deposit of public funds and would be contrary to public policy. Western Indemnity Co. v. Crafts, 240 Fed. 1. This is a question of general law on which federal courts are not bound by state decisions but reach their own conclusions.

Hartford Fire Ins. Co. v. Chicago etc. Ry. Co., 70 Fed. 201, 203.